88-1473 (1)

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA
OCTOBER TERM,1988

BOWLINE CONSTRUCTION COMPANY,
RABON MARTIN AND PAUL E. GARRISON,

Petitioner,

VS.

CAPCO PIPE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

C. Rabon Martin
Paul E. Garrison
1023 West 23rd Street
Tulsa, Oklahoma 74107
(918) 587-9000
ATTORNEYS FOR PETITIONERS.

38pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oklahoma Supreme Court has construed Oklahoma's post-judgment interest statute in an unconstitutional manner by denying interest on an attorney fee after an unsuccessful four year attack thereon.

2. Whether the arbitrary refusal of the Oklahoma Supreme Court to award appellate attorney fees to counsel for the prevailing party, as provided for by statue, is a violation of due process or equal protection under the United States Constitution.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BOWLINE CONSTRUCTION COMPANY,
RABON MARTIN and PAUL E. GARRISON,

Petitioners,

vs.

CAPCO PIPE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The Petitioners, Bowline Construction Company, Rabon Martin and Paul E. Garrison petition this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Oklahoma, to review the constitutional infirmities in the adverse ruling of that court hereinafter delineated and, in support hereof, respectfully state:

OPINION BELOW

The ruling of the Oklahoma Supreme Court was issued without opinion.

JURISDICTION

1. The decision complained of was initially rendered August 17, 1984.

2. The Intermediate Court of Appeals of the State of Oklahoma upheld the decision of the trial court originally

complained of by Opinion rendered and filed April 19, 1988.

3. A timely Petition for Rehearing was denied by the Intermediate Court of Appeals on June 10, 1988.

4. A timely Petition for Certiorari was presented to the Supreme Court of Oklahoma on June 30. 1988 and was denied October 19, 1988. This petition was timely submitted to this Honorable Court but was returned for correction to conform to size and format rules.

5. Jurisdiction to entertain this Writ is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Constitution Amend. V. "No person shall be...deprived of life, liberty, or property, without due process of law..."

2. U.S. Constitution Amend. VIV. "No state shall...deprive any person of life, liberty, or property, without due process of law...nor deny to any person within its jurisdiction the equal protection of the laws."

3. 12 O.S. §681. "A judgement is the final determination of the rights of the parties in an action."

4. 12 O.S. §727A. "All judgments of courts of record shall bear interest..."

5. 12 O.S. §933. "The several clerks of the District Court shall tax the costs in each case, and insert the same in their respective judgments..."

6. 12 O.S. §936. "In any civil action to recover on . . . a contract relating to the purchase or sale of goods , wares, or merchandise. . .the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

7. 12 O.S. §968 "No proceeding to reverse, vacate or modify any judgment or final order. . .shall operate to stay execution, unless the Clerk of the Court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error,

to the adverse party, with one or more sufficient sureties. . .The amount of such undertaking shall be for the whole amount of the judgment or order including costs and interest on the appeal.

STATEMENT OF THE CASE

This action was originally filed in 1969 by Bowline Construction Company, a utility contractor, after Bowline had purchased from CAPCO plastic pipe and glue to be utilized in construction of an 82-mile rural water distribution system in Ralls County, Missouri, and the product proved to be defective. After years of discovery and one mistrial, the case was finally tried before a jury in 1979 and 1980, resulting in a $325,000 recovery.

Under Oklahoma law, the prevailing party is by statute entitled to recover an attorney fee, to be set by the court and taxed as a cost of the action.

After an evidentiary hearing, the trial court determined that plaintiff's two attorneys should receive a total of $346,000 for their combined thirty-four (34) years work on the case. Capco appealed as to the amount only and superseded collection of the fee by posting a bond. The bond made no provision for interest but was approved over Bowline's objection to that omission. Bowline counter-appealed from the order approving the bond without a provision for interest. Oklahoma's Intermediate Court of Appeals affirmed and the Oklahoma Supreme Court denied certiorari, although the fee award was affirmedd in its entirety.

After winning the appeal, Bowline filed a motion to tax as costs a reasonable fee for its attorneys' appellate services. The Oklahoma Supreme Court denied this application without explanation.

The federal questions were first raised in the Petition-In-Error filed in the Oklahoma Supreme Court, in which Bowline asked the Oklahoma Supreme Court to reconsider its decision in McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974), in which Oklahoma's post-judgment interest statute was construed to be inapplicable to taxed costs.

ARGUMENT

Petitioner respectfully urges that certiorari be granted for the reasons hereinafter set forth:

Within the context of appeals of attorney fees taxed as a cost of the action, the Oklahoma Supreme Court has, by a gross and obvious mis-construction of Oklahoma's post-judgment interest and supersedeas bond statutes, deprived appellees in such proceedings of procedural due process of law, by establishing an appellate format in which one litigant cannot lose, and the other cannot win.

Oklahoma law (12 O.S. §681) defines a judgment as "The final determination of the rights of the parties in an action."

Title 12 O.S. §936 allows the prevailing party in certain actions to recover an attorney fee, to be taxed as a cost of the action.

Title 12 O.S. §933 directs that the court shall tax the costs and "...insert the same into judgment."

Title 12 O.S. §727 provides that, "all judgments of courts of record shall bear interest..."

Title 12 O.S. §968 provides for the posting of a supersedeas bond to stay execution pending appeal and requires that such bond "...shall be for the whole amount of the judgment or order including costs and interest on the appeal.

In McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974), the Supreme Court of Oklahoma held that an order awarding attorney fees as a cost of the action was not a "judgment," so as to come within the ambit of 12 O.S. §727, providing that all judgments should bear interest.

Certiorari should be granted by this Honorable Court to review the Oklahoma Supreme Court's interpretation of these statutes because the end result of the application of this interpretation is a rank denial of procedural due process of law to appellees victimized thereby. In the instant case, counsel for Bowline, co-petitioners herein, were awarded a fee of

$346,000 on July 20, 1984. Although admitting liability for a fee of some amount, Capco appealed the $346,000 award as allegedly excessive and superseded collection of the judgment by posting a bond which made no provision for interest, contrary to 12 O.S. §968. Appeals were finally resolved and the award became payable on October 19, 1986, when the Oklahoma Supreme Court denied certiorari. At Oklahoma's applicable post-judgment interest rates, Capco should have owed approximately $148,000 of interest. Only because of the Oklahoma Supreme Court's distorted and inequitable interpretation of the applicable statutes did Capco escape this liability and thereby profit from its totally unsuccessful appeal to that extent. Conversely, the prevailing attorneys who successfully withstood Capco's appeal, have suffered a loss of approximately $148,000. As can be clearly seen, the Oklahoma Supreme Court has, through its interpretation of these statutes, created with respect to appeals of attorney fees taxed as costs, a forum in which the appellant will surely profit and the appellee will surely suffer, no matter how the merits are disposed of. It is respectfully submitted that such a forum is so fundamentally unfair as to deny procedural due process of law.

To add insult to injury, after the fee award was affirmed in its entirety, the Oklahoma Supreme Court denied without explanation or comment a motion to tax an additional fee for the legal services rendered in defending the award on appeal, notwithstanding its decision in Sisney v. Smalley, 690 P.2d 1048 (Okl. 1984), in which it was held that additional fees are recoverable by the prevailing party for legal services rendered in the appellate court. Further, in State Ex Rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okl. 1979), the Oklahoma Supreme Court specifically held that "...attorneys seeking a fee are entitled to reasonable fees for time spent on the application for their fee and in defense of this appeal." (emphasis added) In light of such decisions, the refusal to award such additional fees without comment or explanation could only be deemed

arbitrary and capricious. This Honorable Court has held that a statute may be constitutionally invalid as applied, when it is construed to deprive an individual of his protective right, although the general validity of the statute is beyond question. Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S. Ct. 2202 (1981). As attorneys are entitled to additional fees for defending an appeal of fees allowed in the trial court, this right should apply to all attorneys in all cases and the benefits of this right may not be arbitrarily withheld from a particular attorney in a particular case without violating the equal protection clause.

This Honorable Court has previously held that a State Supreme Court, in construing a state statute, may cause a violation of the due process clause if the error committed is so gross and obvious that it comes close to the boundary of arbitrary action. See, Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct.1697 (1964) and Roberts v. New York City, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689 (1934).

The constitutional guarantee of procedural due process embodies an obligation to resolve all conflicts in a manner "consistent with essential fairness." Lassiter v. Dept. Of Social Services, 452 U.S. 18, 68 L.Ed.2d 640, 101 S.Ct. 2153 (1981). A system in which one party cannot win and the other cannot lose is indisputable short of that standard.

CONCLUSION

This Honorable Court should grant certiorari to review decisions of the Oklahoma Supreme Court in this case and referred to herein for the reason that the establishment of an appellate forum in which one litigant cannot win and the other cannot lose is so fundamentally offensive to American Jurisprudence that it demand to be rectified. Further, the arbitrary refusal to grant additional legal fees to the prevailing party for appellate services smacks of retaliation against petitioner's attorneys for displaying the affrontery to challenge the court's fairness. To leave these decisions standing

unremedied is to effectively approve the transmogrification of Oklahoma Jurisprudence from a system of laws to a system of men.

Respectfully submitted,
C. Rabon Martin
Martin & Turner
1023 West 23 Street
Tulsa, OK 74107
(918) 587-9000
and
Paul Garrison
6960 West Peoria, No. 114
Peoria, AZ 85345
(602) 979-6621
ATTORNEYS FOR PETITIONERS

APPENDIX A

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

BOWLINE CONSTRUCTION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
THE AETNA CASUALTY AND SURETY COMPANY, et al.,	)	
	)	
Defendants.	)	C-69-1778

ORDER

This matter coming on to be heard this 16th day of August, 1984, before the Court upon the application for approval of supersedeas bond of the defendant, CAPCO Pipe Company, Inc. The plaintiff appears by Mr. Paul E. Garrison, Attorney, and the defendant, CAPCO Pipe Company, Inc., appears by Mr. G. Michael Lewis, Attorney. The Court having heard arguments of counsel and specifically the plaintiff's objection to the amount of the bond as not including a projection of interest, finds that said bond should be approved in the principal amount of the attorney fees, without projecting interest thereon.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the supersedeas bond in the principal amount of $346,000.00, the attorney's fee awarded herein, should be and is hereby approved without the projection of interest thereon with an exception allowed to the plaintiff herein.

S/_____
RONALD SCHAFFER, JUDGE

APPROVED AS TO FORM:

PAUL E. GARRISON and
C. RABON MARTIN
BYs/_____
Paul E. Garrison
Attorneys for Plaintiff

DOERNER, STEWART, SAUNDERS,
DANIEL & ANDERSON

BYs/_____
G. Michael Lewis
Attorney for Defendant
CAPCO Pipe Company, Inc.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)	
	)	
Counter-Appellant,	)	
	)	
vs.	)	
	)	
CAPCO PIPE COMPANY, INC., formerly CEMENT ASBESTOS PRODUCTS COMPANY,	)	
	)	
Counter-Appellees.	)	No. 66,915

COUNTER-PETITION-IN-ERROR (AND PRELIMINARY STATEMENT)

A. TRIAL COURT HISTORY

COURT: District CASE NO. C-69-1778

COUNTY: Tulsa JUDGE: Ronald L. Shaffer

DATE JUDGMENT OR ORDER APPEALED PRONOUNCED: August 16, 1984, as supplemented by trial judge's order after remand of June 20, 1986.

POST-TRIAL MOTION: No

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS: N.A.

B. DISPOSITION IN TRIAL COURT

NATURE OF JUDGMENT OR ORDER COUNTER-APPELLANT SEEKS TO REVERSE:

Denial of objection to supersedeas bond and approval of same without provision for interest.

RELIEF SOUGHT BY COUNTER-APPELLANT:

Counter-Appellant sought to have the supersedeas bond include a provision to secure payment of interest accruing on the judgment for attorney fees awarded as costs.

RELIEF GRANTED:

The trial court held that an attorney fee awarded as a cost of the action would not bear interest while said award was being appealed and while collection was superseded, and therefore overruled Counter-Appellant's objection to the supersedeas bond's failure to provide for the post-judgment interest.

RELIEF SOUGHT BY COUNTER-APPELLEE:

The Counter-Appellee sought approval of supersedeas bond including no provision for interest.

RELIEF GRANTED:

The bond was approved without any provision for interest.

C. SUMMARY OF CASE

This action was originally filed in 1969. After a previous mistrial, the case proceeded to jury trial in 1980. In early 1981, after ten and one-half weeks of trial, the jury returned with a verdict for Bowline in the amount of $325,000.00. The verdict was subsequently set aside by the trial court for the failure of Bowline to agree to a remittitur of just over $161,000.00. That decision was successfully appealed and the jury's verdict was reinstated. The judgment has been paid.

On July 20, 1984, after hearing testimony with respect thereto the trial court awarded Bowline an attorney fee of $346,000.00. That judgment is now on appeal by Capco.

Capco posted a supersedeas bond to cover payment in the amount of $346,000.00, which made no provision for post-judgment interest accruing on the award of attorney fees and Bowline objected thereto, but the same was approved and Bowline appealed.

On February 4, 1986, the Court of Appeals remanded the case to the trial court with instructions to supplement its order of June 20, 1984 with specific findings of fact and conclusions of law. Bowline's consolidated appeal relating to the denial of interest was not reached. On June 20, 1986, the

trial court reaffirmed its attorney fee award of $346,000.00, effective as of the date of the original award July 20, 1984 and further provided that, if this Honorable Court should determine that the award would bear interest, said interest would run from the date of the original award July 20, 1984.

Capco has lodged another appeal from the supplemented Order and Bowline now re-appeals the approval of the bond without a provision for interest.

D. ISSUES AND ERRORS RAISED ON APPEAL

1. Whether the Oklahoma Supreme Court should reconsider its decision in McAllister Urban Renewal Authority vs. Hamilton, 521 P.2d 823 (Okl. 1974), wherein it was held that an award of attorney fees, which are taxed as a cost of the action, would not bear interest pending appeal.

2. Whether the Supreme Court's decision in McAllister Urban Renewal, supra, deprives a judgment creditor of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether the decision in McAllister Urban Renewal, supra, is contrary to public policy, as encouraging frivolous appeals.

4. Whether, McAllister Urban Renewal, supra, notwithstanding the posting of a supersedeas bond subjects the obligor under an award of costs to liability for interest under 12 O.S. §968.

ANY RELATED OR PRIOR APPEALS: Yes

1. Precision Polymers, Inc. v. Nelson. Original proceeding in Supreme Court 512 P.2d 811 (Okla. 1973).

2. Cement Asbestos Products Co. v. Precision Polymers, Inc. Case No. 47315.

3. Bowline Construction Company v. Richard Armstrong, Judge. Case No. 54792.

4. Bowline Construction Company v. Capco Pipe Co., Inc., Case No. 57090.

5. Capco Pipe Co., Inc. v. Bowline Construction Co., Appeal No. 62,895.

6. Bowline Construction Co. v. Capco Pipe Co., Inc., Appeal No. 63,066 (consolidated with surviving No. 62, 895).

Court Reporter's estimate of number of transcribed pages; 184 pages for July 16-20, 1984; 38 pages for the remand proceedings on May 13, 1986.

E. IS COUNTER-APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY: Yes

F. IS COUNTER-APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE: Yes

---

G. NAME OF COUNSEL

For Counter-Appellant:
Name: C. Rabon Martin
Firm: Martin, Turner & Zeigler
Address: 1023 W. 23rd St.
Tulsa, OK 74107-2819
Telephone: (918) 587-9000
Name: Paul E. Garrison
Firm: Garrison & Comstock, Inc.
Address: 1509 S. Victor
Tulsa, OK 74104
Telephone: (918) 744-5757

For Counter-Appellee:
Name: G. Michael Lewis
Albert J. Givray
Firm: Doerner, Stuart,Saunders, Daniel& Anderson
Address: 1000Atlas Life Bldg.
Tulsa, OK. 74103
Telephone: (918) 582-1211

H. DATE: July 21, 1986

Verified by:

S/_____
C. Rabon Martin
Martin, Turner & Zeigler
1023 W. 23rd St.
Tulsa, Ok 74107-2819
(918) 587-9000

AFFIDAVIT OF MAILING TO COUNTER-APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT.

I hereby certify that a true and correct copy of the

above and foregoing Petition-in-Error was mailed this _____ day of _____, 1986 to G. Michael Lewis & Albert J. Givray, Doerner, Stuart, Saunders, Daniel & Anderson, at 1000 Atlas Life Bldg., Tulsa, OK 74103, by depositing it in the U.S. mails, postage prepaid.

I further certify that a copy of the above and foregoing Petition-in-Error was filed in the Office of the Court clerk of Tulsa County on the _____day of _____, 1986.

s/_____
C. Rabon Martin

APPENDIX C

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)	
	)	
Appellee and	)	
Counter-Appellant,	)	
	)	
vs.	)	No.66,915
	)	
CAPCO PIPE COMPANY, INC.,	)	NOT FOR
	)	PUBLICATION
formerly CEMENT ASBESTOS	)	
PRODUCTS COMPANY,	)	
	)	
Appellant and	)	
Counter-Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA
Honorable Ronald L. Shaffer, Trial Judge

C. Rabon Martin Tulsa, Oklahoma
Paul E. Garrison
Tulsa, Oklahoma — For Appellee and Counter-Appellant

Sam P. Daniel, Jr.
C. Michael Lewis
Albert J. Givray
Doerner, Stuart, Saunders,
Daniel & Anderson
Tulsa, Oklahoma — For Appellant and Counter-Appellee

MEMORANDUM OPINION

BACON, P.J.

This case has been in court for nearly twenty years. This is the second appeal from an order of the trial court awarding attorney's fees for the first trial that lasted some twenty-seven days and resulted in a mistrial. The second trial commenced in November 1980 and continued for thirty-five actual trial days. Bowline was awarded damages of $325,000. The trial court overruled Capco's motion for new trial subject to a remittitur of $161,090. Bowline rejected the remittitur, and the trial court ordered anew trial. Bowline appealed from this order. The appellant court reinstated the verdict of the jury which was subsequently paid by the defendant, Capco.

A timely motion to tax costs, which included attorney's fees, was filed by Bowline. Lengthy hearings were conducted by the trial court on July 16 and 20, 1984, as to the attorney's fees due counsel employed by Bowline. The trial court ordered Capco to pay the sum of $346,000, $200,000 to Mr. Garrison and $146,000 to Mr. Martin.

Capco in turn appealed this order, and in an unpublished memorandum opinion dated February 4, 1986, the Court of Appeals, Tulsa Divisions, Case No. 62,895, consolidated with Case No. 63,066, reversed the trial court. The reason for reversal was Oliver's Sports Center v. National Standard Insurance, 615 P.2d 291 (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

The thrust of the appellate opinion was that the order was void of factors for the appellate court to ascertain whether the criteria used to compute the attorney's fees were reasonable and appropriate. Absent these factors, the order was incapable of review. The appeals court noted that the Burk requirements would only apply prospectively from the date of the Burk opinion.

On the remand, the trial court reached the same conclusion as previously reached. Capco again appeals.

There are no detailed time records available for either the period prior to the Burk decision thereafter. Capco takes the position that the absence of such detailed time records in the post-Burk period of this lawsuit forecloses the award of any attorney's fees or, at the very most, one-third of the fee awarded. We conclude such reasoning is untenable.

On remand from the first appeal, the trial court make comprehensive findings based on reconstruction of Bowline's counsels' files and court files. There is no question that Bowline's counsel were capable, competent and experienced, and the hourly rate applied by the trial court was well within the community norm.

The trial court heard the evidence presented at the proceedings on July16 and 20, 1984, and arrived at the base compensatory fee for Mr. Garrison and Mr. Martin. To this, the trial court added a "bonus" or "incentive" fee of forty percent to Mr. Garrison's base compensatory fee and twenty percent to Mr. Martin's base compensatory fee.

The trial court has set forth with specificity the facts and computations for the reasonableness of the attorney's fees awarded under the standards set forth in Oliver's Sports Center, Inc. v. National Standard Insurance Co., 615 P.2d 291 (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

There is no competent evidence which supports the judgment, and we find no abuse of discretion on the part of the trial court.[1]

We affirm the trial court as to the judgment of $346,000 in attorney's fees to be taxed as costs.

---

[1] No purpose can now be served to keep remanding the case for evidence that does not exist. Under the circumstances of this case, it would appear that an appellate court could take judicial notice of the fact that the fee awarded was not an excessive fee or an abuse of discretion.

The trial court awarded Bowline interest on the award of attorney's fees. Capco appeals from that ruling.

Bowline seeks interest on attorney's fees. Attorney's fees that are treated as costs do not bear interest unless specifically provided for by statute. McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okla. 1974). In National Educators Life Insurance Co. v. Apache Lanes, 555 P.2d 6000 (Okla. 1976), the court stated that the prevailing party under 12 O.S. 1981 §936, is entitled to reasonable attorney's fees, that they are to be taxed as costs, and that absent any statutory authority, interest on costs cannot be permitted.

Bowline's request for interest on attorney's fees taxed as costs is denied, and that portion of the trial court's judgment awarding interest on attorney's fees from July 20, 1984, is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

MEANS, C.J., and STUBBLEFIELD, J. (sitting by designation), concur.

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)
	)
Petitioner,	)
	)
vs.	)
	)
CAPCO PIPE COMPANY, INC.,	)
formerly CEMENT ASBESTOS	)
PRODUCTS COMPANY,	)
	)
Respondent.	)

No. 66,915

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, DIVISION

COMES NOW the Petitioner, Bowline Construction Co., by its undersigned attorneys, and petitions this Court for a Writ of Certiorari to Division 2 of the Court of Appeals of the State of Oklahoma, to review that Court's decision denying Petitioner relief. In support hereof, Petitioner states:

1. The opinion of which Petitioner seeks review was unpublished and a copy thereof is apprehended hereto in accordance with Rule 3.14.

2. The opinion was rendered and filed April 19, 1988. Rehearing was denied on June 10, 1988, and said Order was filed June 13, 1988.

3. The question presented for review is whether the denial of post-judgment interest on an attorney fee of $346,000, taxed as a cost of the action, and superseded pending appeal, constitutes error. It is submitted that the opinion of the Court of Appeals, approving the denial of post-

judgment interest, is not in accord with applicable decisions of the Supreme Court of the United States. This Court is called upon to reconsider its decision in McAlister Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974)m as reaffirmed in National Educators Life Ins. Co. v. Apache Lanes, Inc., 555 P.2d 600 (Okl. 1976) or, in the alternative, to determine that, while costs, including attorney fees taxed as a cost, would bear not post-judgment interest, the posting of a supersedeas bond by the obligor in and of itself triggers an obligation to pay interest.

4. On July 20, 1984, after "lengthy hearings" (Op. 2), the Court below awarded an attorney fee to two attorneys for an aggregate of thirty-two years of legal services, to be taxed against Capco as a cost of the action. Capco appealed as to the amount only. Bowline appealed from the Order of the court below approving the supersedeas bond over Bowline's objection that it contained no provision for interest. The Court of Appeals affirmed the rulings of the court below, both as to the amount of the fee and the Order approving the supersedeas bond without a provision for interest.

In support hereof, Bowline respectfully offers the following alternative arguments:

(a) 12 O.S. §968 requires that a supersedeas bond provide for interest.
(b) McAlister Urban Renewal should be overruled.
(c) 12 O.S. §727, as construed in McAlister Urban Renewal, violates the U.S. Constitution.

(a) 12 O.S. §968 requires that a supersedeas bond provide or interest.

12 O.S. §968 provides, in part, as follows:

"...[t]he amount of such undertaking shall be for the whole amount of the judgment or order including costs and interest on the appeal." (emphasis added)

In McAlister Urban Renewal v. Hamilton, 521 P.2d 823 (Okl. 1974), this Honorable Court held that the term "judgment" as used in 12 O.S. §727, does not include costs. Thus, an attorney fee taxed as a cost of the action would not bear interest from the date of the award until payment. While we respectfully take issue with the Court's position, the express language of §968 quoted above would seem to render the point moot, where a supersedeas bond is posted pending appeal. This language manifests a legislative intent that, even in the case of an attorney fee taxed as a cost, the Appellant must pay interest if collection was superseded by bond and the judgment is affirmed.

(b) McAlister Urban Renewal should be overruled.

McAlister Urban Renewal was, and is, erroneous. Research has revealed no other jurisdiction in the United States where an attorney fee taxed as a cost of the action would not bear post-judgment interest. Oklahoma stands alone in this anomalous interpretation of 12 O.S. §727. The notion that the term "judgment" as used in Section 727, the post-judgment interest statute, would not include costs stems from McManus v. Burrows, 206 Mo.App. 528, 23 S.W. 129, a 1921 decision of the St. Louis Court of Appeals, interpreting a 1090 Missouri statute which provided for interest on judgments in language entirely different from 12 O.S. §727. In McManus, the St. Louis Court of Appeals concluded that the words "judgment or order" as used in a Missouri's post-judgment interest statute did not include "mere incidental allowances for costs." Upon this tenuous and unique house of cards, the McAlister court construed Section 727 to exclude costs We respectfully take issue with the notion that $346,000 for thirty-two years of work is a "mere incidental." In the four years since the attorney fee was awarded, using the current rate of 9.95%, we are dealing with a profit of Capco and a loss to Bowline's attorneys of $137,708 of "incidentals." Although the amount of the attorney fees has been affirmed in toto, the fee is actually being reduced by $137,000 by the application of

McAlister Urban Renewal. There is no room for dispute that $346,000 four years ago is not the same thing as $346,000 today. As anyone can quickly discover by trying to borrow that sum interest free for four years; thus, although the trial court's fee determination has been ruled absolutely correct, that decision will not be carried out because there is no way to pay the money four years ago!

Even Missouri now takes a different view. In Johnson v. Mercantile Trust, 510 S.W.2d 33 (Mo. 1974), the Missouri Supreme Court, although not specifically overruling McManus, stated:

"He who has the use of another's money, or money he ought to pay, should pay interest on it."

If the Missouri's Supreme Court's quote in Johnson v. Mercantile Trust, supra., reflects an axiom of equity, McAlister Urban Renewal is therefore, by definition, inequitable.

McManus aside, McAlister Urban Renewal is simply wrong. The cornerstone of the decision is the assumption that the taxation of costs is not a part of the judgment itself. A judgment is defined in 12 O.S. §681 as follows:

"A judgment is the final determination of the rights of the parties in action. One of those rights spelled out by statute is the right of the prevailing party in certain actions to recover an attorney fee."

Even decisions of this Honorable Court before McAlister Urban Renewal would indicate that costs would be included as a part of the judgment and would thus bear interest. See, for example, Dixon v. Peacock, 33 Okl. 87, 141 Pac. 429 (1914), in which this Honorable Court held that a judgment that the costs of the action be taxed against the Defendants was the equivalent of "adjusting the costs" against the Defendant and, therefore, came within 12 O.S. §681. An order taxing costs is clearly a judgment, as defined by the legislature.

In any event, 12 O.S. §933 would seem to settle the matter decisively. It provides:

"The several clerks of the district court shall tax the costs in each case, and insert the same in their respective judgments..." (emphasis added)

It is evident from the language employed by the legislature in this statute that, following insertion of the costs into the judgment, the costs become a part thereof, and would logically draw interest to the same extent as the rest of the judgment. Nothing in 12 O.S. §727 evidences a legislative intent to exclude interest on costs.

McAlister Urban Renewal also frustrates and violates Oklahoma public policy by encouraging frivolous appeals. Capco has been rewarded by this Court $137,708 for prosecuting its merit less appeal.

(c) 12 O.S. §727 as interpreted in McAlister Urban Renewal, violates the U.S. Constitution.

(i) Due Process - The Constitutional guarantee of procedural due process of law embodies an obligation to resolve the conflict in a manner "consistent with essential fairness." Lassiter v. Dept. of Social Services, 68 L.Ed2d 640, 101 S.Ct. 2153 (1981); Hanna v. Larche, 363 U.S. 424, L.Ed.2d 1307, 80 S.Ct. 1502. It is respectfully submitted that a system in which one litigant cannot lose, and the other litigant cannot win, regardless of the decision of the Court on the merits, is, by definition, fundamentally unfair. Capco's four-year attack on the attorney fee awarded below, was totally unsuccessful.. Nevertheless, Capco has profited $137,708 and Bowline's attorneys have lost that sum. The affirmance means that Capco should have paid the $346,000 attorney fee on July 20, 1984. It did not do so and Bowline was precluded by 12 O.S. §968 from collecting the judgment, pending appeal. Once that bond was posted, Capco could not lose, even if the decision was totally affirmed. Thus, this Honorable Court's interpretation of 12 O.S. §727, has established a system whereby a debtor under a judgment for costs is guaranteed

financial gain by the prosecution of an appeal and the appellee is guaranteed financial loss, and no ruling of the Appeal Court on the merits can alter those guarantees. That is fundamentally unfair and does violence to the Fifth Amendment to the United States Constitution. It is unthinkable that the U.S. Supreme Court would ever approve a state court appeals system in which a successful litigant is guarantee financial loss.
(ii) Equal Protection - 12 O.S. §727, as construed in McAlister, violates the equal protection clause, by creating two classes of appellees - attorneys and everyone else. There is no rational basis for this classification and no legitimate legislative objective can even be hypothesized. The traditional test for denial of equal protection requires that the Court ascertain the basis of the classifications, the governmental objective purportedly advanced by the separate classifications, and then make a comparison between the classification and the objective to the achievement of any legitimate legislative purpose that a court can only conclude that the legislature's actions were irrational. In the present instance, it is not the statute itself, but a construction thereof imposed thereon by this Honorable Court in McAlister Urban Renewal which yields the unequal treatment.

No legitimate legislative objective can be fathomed which would induce the legislature to allow all judgment creditors except beneficiaries of an award of attorney fees taxed as costs to bear interest. In fact, in all likelihood there was no such legislative intent, nor was the question even considered when the interest statute was enacted. We cannot help but surmise that the denial of interest on costs originated entirely in the Supreme Court.

SUMMARY OF ARGUMENT

Because the bond fails to conform with the specific language requiring a provision for interest, because McAlister Urban Renewal is so fundamentally unfair as to even violate

the federal Constitution and because it is so ill-reasoned, this Honorable Court should grant certiorari and correct the unfairness imposed upon litigants by a system in which one cannot lose, and the other cannot win.

S/_____

C. Rabon Martin
Martin & Turner
1023 West 23rd Street
Tulsa, OK 74107
(918) 587-9000

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 1988, a true and correct copy of the foregoing instrument was mailed, postage prepaid, to the following:

S/_____

Sam P. Daniel, Esq.
G. Michael Lewis, Esq.
Doerner, Stuart, Saunders
Daniel & Anderson
1000 Atlas Life Building
Tulsa, OK 74103

S/_____

C. Rabon Martin

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, October 19, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

66,915 Bowline Construction Company v. CAPCO Pipe Company, Inc., formerly Cement Asbestos Products Company. Both peitions for certiorari denied.
CONCUR: Doolin, C.J., Lavender, Simms, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, V.C.J., Opala, J.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BOWLINE COSTRUCTION CO.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
CAPCO PIPE COMPANY, INC.,	)	
formerly Cement Asbestos	)	
Products Company,	)	
	)	
Defendant.	)	No. 66,915

MOTION TO TAX ADDITIONAL COSTS

COMES NOW the Appellant, Bowline Construction Company, by and through its undersigned attorney, and moves that the Court tax additional costs for legal services rendered in defense of the attorney fee which was the subject of this action.

In Sisney v. Smalley, 690 P.2d 1048 (Okla. 1984), it was held that additional fees may be allowed to the prevailing party forlegal services rendered in the Appellate Court.

It is respectfully requested that the mandate include a direction to the trial court to conduct a hearing to determine the appropriate fee for Appellate services. In Professional Const. Consultants, Inc. v. State, Ex Rel. Grimes, 646 P.2d 1262 (Okla. 1982), it was held that attorney fees to the successful party in the appeal may be awarded either by the Supreme Court or by the trial court. Sice an evidentiary hearing will be required, it is respectfully suggested that such proceedings be conducted in the trial court. If the Supreme Court elects to set the Appellate fee, upon notification, counsel

will submit appropriate evidence to support the requested fee.

Respectfully submitted,

S/_____
C. Rabon Martin
Martin 7 Turner
1023 West 23 Street
Tulsa, OK 74107
(918) 587-9000

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of October, 1988, a true and correct copy of the foregoing instrument was mailed, postage prepaid thereon, to the following:

G. Michael Lewis, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
1000 Atlas Life Bldg.
Tulsa, OK 74103

S/_____
C. Rabon Martin

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, November 14, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

66,915 BOWLINE CONSTRUCTION CO. V. CAPCO PIPE COMPANY, INC formerly Cement Asbestos Products Company

Appellee's motion for appeal-related counsel fees is denied.

DOOLIN, C.J., HARGRAVE, V.C.J., HODGES, LAVENDER, OPALA, WILSON and KAUGER, JJ. - Concur; SIMMS, J. - Disqualified; SUMMERS, J. - Dissents

Supreme Court, U.S.
FILED
MAR 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1473 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

BOWLINE CONSTRUCTION COMPANY, RABON MARTIN, AND PAUL E. GARRISON,
Petitioners,

v.

CAPCO PIPE COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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March 23, 1989

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34pp

QUESTIONS PRESENTED

I. Has Oklahoma's statutory rule of denying interest on attorney fees taxed as costs deprived Petitioners of procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution?

II. Did the Oklahoma Supreme Court's denial of appeal-related attorney fees deprive Petitioners of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

All Petitioners and Respondent are named in the caption. All parties before the Oklahoma Supreme Court are before this Court.

RULE 28.1 STATEMENT

Respondent CAPCO Pipe Company, Inc. ("CAPCO") does not have any subsidiaries or affiliates. CAPCO is a wholly owned subsidiary of ASARCO Incorporated. ASARCO Incorporated does not have a parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

Alpha Metals of Japan Inc. (Japan)
Alta Mining and Development Company (Utah)
Asarco Australia Limited (Australia)
Blackhawk Mining and Developing Company, Limited (Idaho)
Blasbert Oberflaechentechnik GmbH (Solingen)
Brown Builders Inc. (Tennessee)
Cooper Basin Railway, Inc. (Delaware)
Corporacion Minera Nor Peru, S.A. (Peru)
Ebara-Udylite Co., Ltd. (Japan)
Electroplating Engineers of Japan Ltd. (Japan)
Electroplating Engineers of Taiwan Ltd.
Federated Genco Limited (Canada)
Friedrich Blasberg Svenska AB (Sweden)
Galvano Production Chemie GmbH (Solingen)
Geominerals, Ltd. (Bermuda)

Government Gulch Mining Company, Limited (Idaho)
Green Hill Mining Company (Nevada)
Hau-Mei Electroplating Technology Co. Ltd. (China)
L.P.W. Chemie GmbH (Neuss/BRD)
LAB Chrysotile Inc. (Canada)
Lesarco, Inc. (Philippines)
Liard River Mining Company Ltd. (N.P.L.) (Canada)
Mexico Desarrollo Industrial Minero, S.A. (Mexico)
Neptune Mining Company (Delaware)
Nihon LPW K.K. (Japan)
OMETEC, S.A. (Switzerland)
OMI Chemical Industries Pte. Ltd. (Singapore)
Southern Peru Copper Corporation (Delaware)
Wyoming Mining and Milling Company, Limited (Idaho)

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No. 88-1473

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

BOWLINE CONSTRUCTION COMPANY, RABON MARTIN, AND PAUL E. GARRISON,

Petitioners,

v.

CAPCO PIPE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent CAPCO Pipe Company, Inc. ("CAPCO"), asks this Court to deny the request of Petitioners Bowline Construction Company, Rabon Martin, and Paul E. Garrison (collectively, "Bowline" or "Petitioners") for a writ of certiorari to the Oklahoma Supreme Court.

OPINIONS BELOW

Oklahoma's intermediate Court of Appeals issued an unpublished memorandum opinion on April 19, 1988, which affirmed both the trial court's $346,000 award of attorney fees to Bowline and its attorneys (Messrs. Martin

and Garrison), and also the trial court's denial of interest on that award. App. C-1.[1] The Oklahoma Supreme Court denied certiorari on October 19, 1988. But the Oklahoma Supreme Court did not decide this case on the merits, so Petitioners have requested that a writ of certiorari be directed to the wrong court. *See Faretta v. California,* 422 U.S. 806, 812 (1975); *Callender v. Florida,* 380 U.S. 519 (1965), 383 U.S. 270 (1966).

JURISDICTION

This Court does not have jurisdiction in this case because Petitioners have not properly raised a substantial federal question before the Oklahoma state courts. *See* 28 U.S.C. § 1257(a).[2] This fatal jurisdictional defect is discussed below at pp. 8-15.

STATEMENT OF THE CASE

1. The underlying action. The $346,000 attorney-fee award arises in a suit for breach of warranty on sold goods. Petitioner Bowline sought recovery for defective labor and materials used in a water distribution system. Respondent CAPCO was one of several defendants.

---

[1] Petitioners' Appendix is cited as "App._____."

[2] Petitioners incorrectly posit jurisdiction under the now repealed 28 U.S.C. § 1257(3).

The case was first tried in 1974. After 27 trial days, a mistrial was declared because Mr. Ray Bowline (Petitioner Bowline's chief executive officer) made improper contact with two jurors. Bowline then settled with all defendants except CAPCO.

Before the second trial began, Bowline sought a writ of mandamus from the Oklahoma Supreme Court compelling disqualification of the trial judge. The Oklahoma Supreme Court denied mandamus relief.

The second jury trial covered 35 days between November 17, 1980, and January 27, 1981. The jury awarded Bowline $325,000 and CAPCO received a $57,453 directed verdict on its counterclaim for unpaid open accounts.

The trial court ordered that Bowline accept a remittitur of $161,090. Bowline appealed. Oklahoma's intermediate Court of Appeals reinstated the full $325,000 verdict, upheld the trial judge's refusal to recuse himself, and affirmed the directed verdict on CAPCO's counterclaim. CAPCO paid this judgment.

2. The first attorney-fee award, its appeal, and its reversal. After the appeal was decided, the trial court on July 20, 1984 awarded Bowline $346,000 in attorney fees taxed as costs, with $146,000 allocable to Petitioner Rabon Martin and $200,000 allocable to Petitioner Paul E. Garrison. App. C-2. The total $346,000 fee award exceeded the jury verdict by $21,000.

Respondent CAPCO appealed the amount of the attorney-fee award, arguing that the fee was unreasonable

and not properly substantiated. App. C-2. CAPCO posted an appeal bond for the $346,000 awarded amount. Bowline objected on the basis that the bond did not provide for interest on the attorney-fee amount. The trial court held that under Oklahoma law an award of attorney fees taxed as costs does not bear interest.

Bowline appealed, assigning as error that the no-interest ruling "deprives a judgment creditor of *equal protection of the law,* as guaranteed by the Fourteenth Amendment to the United States Constitution." Petition in Error at 3 (filed September 13, 1984, in Oklahoma Appeal No. 63066) (emphasis added). This equal protection argument was not made to the trial court, but was raised for the first time on appeal and was briefed in Bowline's Brief in Chief at 25-27 (filed January 21, 1985) and Bowline's Reply Brief at 7-9 (filed March 19, 1985). *Bowline made no due process argument at any time during this appeal.*

Respondent CAPCO prevailed on the attorney-fee aspect of the appeal. The Oklahoma Court of Appeals reversed the trial court because that court's order "was void of the factors for the appellate court to ascertain whether the criteria used to compute the attorney's fees were reasonable and appropriate." App. C-2. The Court of Appeals did not address the question of interest on attorney fees.

3. The second attorney-fee award and its appeal. On remand, the trial court re-awarded $346,000 in attorney fees to Petitioners, just as before. Bowline again com-

plained that the bond did not provide for interest on the attorney fees taxed as costs. The trial court again refused to require a bond for interest, because Oklahoma law does not allow interest on attorney fees taxed as costs.[3] Bowline raised neither an equal protection challenge nor a due process challenge before the trial court.

CAPCO again appealed the merits of the fee award. And Bowline again appealed the interest issue, asserting verbatim the claim which Bowline had made on the first fee appeal: that the no-interest ruling "deprives a judgment creditor of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution." App. B-3. The equal protection argument was raised, again, for the first time on appeal. *Bowline made no due process claim in its assignments of error.* App. B-3.

Bowline filed only one brief on the merits of its appeal on the interest issue. That brief raised *only an equal protection* challenge to the no-interest holding. Bowline argued that equal protection was denied because the applicable statute had been construed to create two classes of judgment creditors: (1) those who hold judgments for costs, and (2) those who hold other money judgments. Bowline's Brief in Chief at 46-48 (filed March 10, 1987). Through a May 11, 1987 letter to the Clerk of the Oklahoma Appellate Courts, Bowline waived its right to file a reply brief.

[3] The opinion of the Oklahoma Court of Appeals mistakenly states that the trial court awarded interest. App. C-4. It did not. This mistake is harmless, since the Oklahoma Court of Appeals ultimately held that Oklahoma law does not permit interest on attorney fees taxed as costs.

On April 19, 1988, the Oklahoma Court of Appeals issued an unpublished memorandum opinion which affirmed the amount of the fee award and which upheld the denial of interest on such award. App. C-1. The Oklahoma Court of Appeals held that controlling Oklahoma statutory and case law does not permit interest on attorney fees taxed as costs. App. C-4. The court did not decide the equal protection question.

Bowline sought rehearing. *For the first time during two appeals spanning five years,* Bowline argued that the no-interest holding violated due process. Bowline argued that procedural due process was denied by "establishing a system in which one litigant cannot lose, and the other litigant cannot win . . . ." Bowline's Petition for Rehearing at 5 (filed May 3, 1988). Rehearing was denied with no comment made on either the equal protection issue (raised for the first time on appeal) or the due process issue (raised for the first time on rehearing).

On July 1, 1988, Bowline sought certiorari in the Oklahoma Supreme Court and raised the due-process-unfair-system argument, App. D-5, as well as the equal protection argument. App. D-6. Certiorari was denied, again without comment on either the untimely equal protection issue or the belated due process issue.

4. The request for and denial of appellate-related attorney fees. After the Oklahoma Supreme Court denied certiorari, Bowline filed a motion for an award of appeal-related attorney fees. App. F-1. On November 18, 1988, the Oklahoma Supreme Court entered an order denying

Bowline's "motion for appeal-related counsel fees . . . ." App. G-1. *Bowline did not seek reconsideration and did not argue that the refusal to award appellate-related fees violated equal protection or due process.*

SUMMARY OF ARGUMENT

This Court should deny certiorari because Petitioners have not properly raised or preserved any substantial federal question. Petitioners' first question presented intimates that denying interest on attorney fees taxed as costs is unconstitutional. The *only* argument made in the body of the Petition for Certiorari is that denying interest violates procedural due process by creating an unfair system where one party cannot win and the other party cannot lose. *See* Petition for Certiorari at 4-5. This argument was not made to the trial court, was never assigned as error below, was never decided by the state appellate courts, and appears below only as a belated argument on rehearing.

The equal protection argument made below by Petitioners was not raised before the trial court. It was raised for the first time before the Oklahoma Court of Appeals. More importantly, Petitioners have waived such issue in this Court. The equal protection issue is not contained in the questions presented for this Court's review, and is not argued in the body of the Petition for Certiorari. *See* Petition for Certiorari at 4-5.

The second question presented by Petitioners suggests that the refusal to award appellate-related attorney fees

violates due process and equal protection. *See* Petition for Certiorari at 5-6. Petitioners had an opportunity to present this constitutional claim to the Oklahoma Supreme Court, but wholly failed to do so. After denial of appeal-related fees, Petitioners failed to exercise their opportunity to ask for reconsideration and to lodge their constitutional complaints.

Petitioners' own failures have deprived this Court of jurisdiction to consider any constitutional issue. This Court has long held that it has no jurisdiction to consider improperly raised or unpreserved constitutional questions.

Even if the issues were properly preserved, this Court should still deny certiorari review. Not only do the state-court decisions accord with this Court's decisions, but adequate and independent state grounds of decision exist which dispense with the need to consider any constitutional questions.

REASONS FOR DENYING CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS EITHER PROPERLY RAISED IN THE STATE COURTS OR PROPERLY PRESERVED FOR REVIEW BY THIS COURT.

A. The Standard for Granting Certiorari: A Properly Raised Substantial Federal Question Is a Jurisdictional Prerequisite.

Under 28 U.S.C. § 1257, it is an *absolute jurisdic-*

tional requirement that the asserted federal claim either be decided by the state court, or be explicitly and timely raised by the party if not decided by the state court. *Hill v. California,* 401 U.S. 797, 805 (1971); *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940). Exceptionally strong policy considerations underlie this jurisdictional requirement. First, the record is very likely to be inadequate on federal questions not raised in the state court. Second, in a federal system, it is important that state courts be given the first opportunity to consider the constitutionality of state statutes since the statutes may then be construed in a way which saves their constitutionality. Third, if the federal question is raised below, it might be decided by the state court on adequate and independent state grounds, thus rendering review by this Court unnecessary. *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

The rule in this Court is well settled. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to a want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969).[4] This rule applies with equal force even where the parties address the constitutional issue in their state-court briefs after having failed to raise the constitutional issue as re-

[4] *See also Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974); *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945); *Chicago, I. & L. Ry. v. McGuire,* 196 U.S. 128, 131-33 (1908).

quired by state procedure. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983).

Thus, when required by state practice, the federal question must be raised before the trial court as a predicate to this Court's jurisdiction. Otherwise, certiorari must be denied. *See Edelman v. California,* 344 U.S. 357, 358 (1953) (failure to raise issue at trial); *Hulbert v. Chicago,* 202 U.S. 275, 279 (1906) (complete failure to raise question at trial court level); *Brown v. Massachusetts,* 144 U.S. 573, 580 (1892) (failure to raise question before verdict); *In re Lamkin,* 355 U.S. 59 (1957). Oklahoma law is clear that absent exceptional circumstances, the Oklahoma Supreme Court will not consider constitutional questions not presented to the trial court. *See, e.g., Northwest Datsun v. Oklahoma Motor Vehicle Commission,* 736 P.2d 516, 520 (Okla. 1987); *McGlumphy v. Jetero Construction Co., Inc.,* 593 P.2d 76, 83 (Okla. 1978); *Pelican Production Corp. v. Mize,* 573 P.2d 703, 704 (Okla. 1977); *Missouri-Kansas-Texas R.R. v. Prince,* 271 P. 253, 254 (Okla. 1928). Therefore, when the federal question is first raised in the state-court petition in error, the jurisdiction of this Court cannot attach. *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945).

The constitutional issue must not only be raised before the trial court, but must be properly raised according to state *appellate* procedures. Otherwise, the party will be deemed to have waived the federal issue and there is no basis for the assertion of this Court's jurisdiction. *Beck v. Washington,* 369 U.S. 541, 553 (1962); *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S.

308, 313 n.6 (1968); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Beaty v. Richardson,* 276 U.S. 599 (1928).

The Oklahoma Supreme Court will not review any allegation of error not contained in a party's petition in error. *See, e.g., Timmons v. Royal Globe Insurance Co.,* 653 P.2d 907, 912 (Okla. 1982); *Greene v. Circle Insurance Co.,* 557 P.2d 422, 423 (Okla. 1976); *Stillwater Industrial Foundation, Inc. v. State ex rel. Board of Regents for Oklahoma A & M Colleges,* 541 P.2d 173, 178 (Okla. 1975); *Bredouw v. Wilson,* 256 P.2d 421, 424 (Okla. 1953) (constitutional issue not presented in petition in error will not be decided even if raised in both parties' briefs).

Finally, this Court's jurisdiction may not be invoked by raising the federal question for the first time in a state-court rehearing petition, unless the state court actually entertains the petition and expressly decides the federal question. *See, e.g., Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932).

B. Petitioners Have Not Properly Raised or Preserved Any Substantial Federal Question.

Petitioners bear the heavy burden of demonstrating this Court's jurisdiction. Supreme Court Rule 21.1(h) requires the statement of the case to specify "the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought

to be reviewed were raised . . . .'' Thus, ''when the highest state court fails or refuses to pass expressly upon a federal question [then] the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation.'' R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice at 150 (6th ed. 1986).

In this case, the Oklahoma state courts never decided the constitutional issues. Thus, that ''high burden'' falls upon Petitioners to demonstrate that the issues were properly raised. Petitioners attempt to meet that burden in one short paragraph in their Petition for Certiorari. *See* Petition for Certiorari at 3. That short paragraph refers only to the assignment of error raised in the state-court Petition in Error. *See* App. B-3. As discussed above, that assignment of error raises only a now abandoned equal protection claim concerning failure to allow interest on the award of attorney fees. This meager effort to raise a federal question is too little and too late.

1. The equal protection challenge to the no-interest holding was not timely raised.

Petitioners have failed to show that the equal protection challenge was made before the trial court. Under Oklahoma procedure, an Oklahoma appellate court will not consider any constitutional question not presented to the trial court. *See supra* p. 10. Petitioners' failure to raise this issue ''in the court of first instance'' deprives this Court of jurisdiction. S. Ct. Rule 21.1(h).

Also, Petitioners have waived this argument in their Petition for Certiorari. The first question presented for review is ambiguous; it states only that the no-interest holding is "unconstitutional." Petition for Certiorari at i. Reference to Petitioners' argument on the first question presented demonstrates that "unconstitutional" refers only to a denial of procedural due process. Petition for Certiorari at 4-5.

2. The procedural due process issue was not timely raised.

Petitioners' first question presented deals with whether procedural due process is denied "by establishing an appellate format in which one litigant cannot lose, and the other cannot win." Petition for Certiorari at 4. Petitioners argue that this is the result of denying interest on attorney fees taxed as costs. This argument receives more treatment in the Petition for Certiorari than in all of Petitioners' briefs before the Oklahoma courts.

This argument was never raised before the trial court. The state-court Petition in Error contains nothing about a due process claim. Nor do Bowline's briefs on the merits ever address the due process issue. In fact, the due process issue was never raised until after the Oklahoma Court of Appeals had decided this case. *Not until rehearing* did Petitioners attempt to raise the due process argument. Even that argument was relegated to one typed paragraph on rehearing, compared to over one and one-half printed pages in the Petition for Certiorari here.

Under Oklahoma procedure, a constitutional issue

not raised before the trial court, and not assigned as error in the petition in error, will not be considered by an Oklahoma appellate court. Therefore, Petitioners have deprived this Court of jurisdiction over the asserted due process error.

3. The constitutionality of denying appellate-related attorney fees was not properly preserved.

Petitioners assert that the Oklahoma Supreme Court's failure to award appellate-related attorney fees violated due process and equal protection. *See* Petition for Certiorari at 5-6. It is too late to raise a federal question for the first time in papers before this Court. *See, e.g., White River Lumber Co. v. Arkansas ex rel. Appelgate,* 279 U.S. 692, 700 (1929); *Whitney v. California,* 274 U.S. 357, 362-63 (1927); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341, 344 (1920); *Thomas v. Iowa,* 209 U.S. 258, 263 (1908).

After the Oklahoma Supreme Court denied certiorari in this case, Petitioners filed a motion for an award of appellate-related attorney fees. App. F-1. The Oklahoma Supreme Court denied that motion. App. G-1. Petitioners' motion did not raise the constitutional issue. App. F-1. After the motion was denied, Petitioners failed to request reconsideration based on the constitutional issues. Instead, Petitioners ignored settled procedures and attempted to raise the issue for the first time in this Court. Thus, the constitutional issue was not presented to the state court and was not decided by the state court. Nor was the constitutional issue "evaded" by the state court. The Oklahoma

court was simply never given the opportunity (mandated by this Court) to consider that issue. Therefore, Petitioners have failed to preserve a constitutional issue for this Court's jurisdiction.

This case is wholly inappropriate for certiorari review by this Court. Petitioners' constitutional claims—on the merits weak at best as shown in Arguments II and III *infra*—were not properly preserved for this Court's review. Because they were not presented below, this Court has no adequate record to review the questions. Because they were not presented below, the state courts were not given an opportunity to construe the state law in a manner which saves its constitutionality. Because they were not presented below, the state courts were not given an opportunity to discuss how adequate and independent state grounds render decision on those constitutional questions unnecessary. Properly raising the asserted federal questions is a jurisdictional mandate. Petitioners have failed to raise the constitutional questions properly. This Court therefore lacks jurisdiction to issue any writ of certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE WITHHOLDING INTEREST ON AN AWARD OF ATTORNEY FEES TAXED AS COSTS ACCORDS WITH THIS COURT'S DECISIONS.

Petitioners' base complaint is a feeling that the Oklahoma Supreme Court has misinterpreted Oklahoma statutes regarding allowance of interest. *See* Petition for Certiorari at 4. Oklahoma law is well settled that interest is not allowed on attorney fees taxed as costs. *See McAlester*

Urban Renewal Authority v. Hamilton, 421 P.2d 823, 825-26 (Okla. 1974); *National Educators Life Insurance Co. v. Apache Lanes, Inc.,* 555 P.2d 600, 602 (Okla. 1976) (declining to overrule *McAlester*). Questions of state law interpretation fall exclusively within the province of state courts. Even if this Court disagrees with the resolution of a state law issue, it has no jurisdiction to change that resolution.

> It has been stated that when a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.

Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 30 (1916).

Thus, Petitioners' claim must wholly fail unless they can demonstrate that the decision below was "impossible in a rational administration of justice . . . ." *Id.* This Court's own holdings demonstrate that interest may be disallowed on an award of attorney fees. For example, in *Library of Congress v. Shaw,* 478 U.S. 310 (1986), this Court reaffirmed its "repeated holdings that interest [on awards of attorney fees] may not be awarded against the government in the absence of express statutory or contractual consent." *Id.* at 314. This rule is deeply rooted in the common law which denied interest unless an agreement to the contrary existed. *See id.* at 314-15; *Sisney v. Smalley,* 690 P.2d 1048, 1050 (Okla. 1984). It is almost frivolous to

suggest that a rule so deeply rooted in the common law is "impossible in a rational administration of justice."[5]

This Court's decisions amply show that it is permissible to deny interest on an award of attorney fees. This Court has long held that taxing attorney fees as costs on some obligations but not on others triggers no equal protection violation, despite the creation of "have" and "have not" classifications of judgment debts. *See, e.g., Life & Casualty Ins. Co. v. McCray,* 291 U.S. 566, 569-70 (1934). *See also Riter-Conley Mfg., Co. v. Wryn,* 174 P. 280, 283, 284-85 (Okla. 1918). If the disparate treatment of judgment debts (costs) themselves does not violate equal protection, then neither can there be any constitutional infirmity in the disparate treatment of *interest* on judgment debts.

Nor is there any due process violation here. Legislative enactments enjoy a presumption of validity and rationality. *See Life & Casualty Ins. Co.,* 291 U.S. at 572. The burden is upon Petitioners to show a lack of even minimum rationality for disallowing interest on the "costs"

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[5] In fact, the seemingly unanimous and well-settled rule in the United States has been that interest is not allowed on awards of costs or attorney fees unless explicitly allowed by statute. *See, e.g., McKeague v. Talbert,* 658 P.2d 898, 908 (Ha. Ct. App. 1983); *Pillow v. Board of Commissioners,* 425 So.2d 1267, 1284 (La. Ct. App. 1982); *Overmyer v. Lawyers Title Insurance Corporation,* 359 A.2d 260, 268 (Md. Ct. App. 1976); *Wolfe v. Madison National Bank,* 352 A.2d 914, 918 (Md. Ct. App. 1976); *City of Tukwila v. Todd,* 563 P.2d 223, 227 (Wash. Ct. App. 1977); *City of Charlotte v. McNeeley,* 190 S.E.2d 179, 188 (N.C. 1972); *Janes v. Busby,* 93 S.W.2d 788, 918 (Tex. Ct. App. 1936); *Jones v. O'Donnell,* 290 N.W. 375 (Mich. 1940); *McManus v. Burrows,* 177 S.W. 671 (Mo. Ct. App. 1915).

portion of a judgment. *See generally New Orleans v. Dukes,* 472 U.S. 297, 303 (1976).

A reasonable state legislature could rationally adopt a policy goal of requiring all citizens to finance their own litigation. The by-product of such a policy would be the denial of interest altogether while the debt was being challenged during appeal. Since a reasonable legislature could have denied all interest on the entire judgment, as at common law, a legislature is being no less rational by denying interest to a portion less than the whole of the judgment (*e.g.*, costs).[6]

The Oklahoma Legislature has apparently adopted precisely such a rational policy. It follows that nothing about Okla. Stat. tit. 12, § 727(A) (Supp. 1988) or any other pertinent Oklahoma statute suffers from any constitutional infirmity, whether equal protection, due process, or otherwise.

III. CERTIORARI SHOULD BE DENIED BECAUSE DENYING APPELLATE-RELATED ATTORNEY FEES IMPLICATES NO CONSTITUTIONAL CONCERNS.

Petitioners' second question presented concerns the

[6] In fact, a reasonable legislature could go so far as to *entirely deny* a recovery of attorney fees. The "American rule" is to deny attorney fees to a prevailing party absent a statute or contract explicitly allowing fees. The American rule is firmly embedded in this Court's jurisprudence. *See generally Hall v. Cole,* 412 U.S. 1 (1973); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). Petitioners' meritless argument necessarily suggests that this Court has acted *ir*rationally in repeatedly affirming the American rule.

state court's denial of appellate-related attorney fees. Petitioners argue that since they "prevailed" on appeal, they are entitled to attorney fees on appeal under state law. The Oklahoma Supreme Court decided this question of state law against Petitioners, so Petitioners now attempt to make a constitutional question out of that state-law decision.

Petitioners' allegations present no substantial federal question. First, this issue may be resolved wholly on the basis of state law.[7] Petitioners claim to be prevailing parties on appeal, but they neglect to tell this Court the whole story. Since the 1981 jury verdict, this case has seen three state-court appeals: one appeal concerning the jury verdict itself and two appeals on the dual questions of attorney-fee amount and interest. Following the jury verdict, both Petitioner Bowline and Respondent CAPCO filed appeals. Bowline successfully defended its jury verdict; CAPCO successfully defended its directed verdict; and CAPCO also successfully defended the trial judge's refusal to recuse himself. *See supra* p. 3. Thus, in appeal round one, Respondent CAPCO prevailed on two-thirds of the issues presented to the state court.

In appeal round two, Bowline appealed the trial court's denial of interest on the attorney-fee award, and

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[7] This Court has long held that if the decision below rests upon adequate and independent state grounds, the Court will not assume jurisdiction because federal jurisdiction fails. *See, e.g., Klinger v. Missouri,* 80 U.S.(13 Wall) 257, 263 (1871); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

Respondent CAPCO appealed the $346,000 amount of the fee award. The Oklahoma Court of Appeals did not address the interest issue, but reversed the amount of the fee award and agreed with CAPCO that the trial court had failed to require adequate substantiation of the fee amount. *See supra* p. 4. Thus, on the second round of appeal, Respondent CAPCO won completely.

During appeal round three, Respondent CAPCO again appealed the amount of the attorney-fee award, and Petitioner Bowline again appealed the trial court's denial of interest on the fee amount. Neither party prevailed in their own appeal. The Court of Appeals upheld the amount of the fee award and denied interest on the awarded amount. Thus, in the third round of appeal, each party prevailed in the other party's appeal.

The state court's refusal to award appellate-related fees to Petitioners is manifestly justified on state-law grounds. Petitioners simply cannot be deemed prevailing parties throughout the entire course of the appeal process. Instead, each party prevailed on some issues, lost on other issues, and on balance were equally successful.

When taxing costs, a court must always be guided by equity. *See, e.g., Wheeler v. Benson-Taylor, Inc.*, 394 P.2d 523, 528 (Okla. 1964); *Bosworth v. Eason Oil Co.*, 213 P.2d 548, 556 (Okla. 1950). Thus, as a matter of equity and judicial discretion, there is no single prevailing party whenever each party prevails on different issues. *See, e.g., Moen v. Norwest Bank of Minot*, 647 F. Supp. 1333, 1344 (D.N.D. 1986); *Chenery v. Argi-Lines Corp.*, 682 P.2d

640, 645 (Idaho Ct. App. 1984).

The simple presence of a prevailing-party issue shows that the action of the state court was not "arbitrary and capricious" as claimed by Petitioners. This very presence also shows a rational distinction between allowing appeal-related attorney fees in some cases, while disallowing such fees in others. In short, the case here involves merely a question of state law and a question of appellate fact: Was the "winning" party qualitatively successful enough to be labeled as a "prevailing" party? This question and the Oklahoma Supreme Court's "no" answer show a rational basis for denying appeal-related attorney fees here. This inquiry also demonstrates that the result below was "not so gross as to be impossible in a rational administration of justice," but instead was firmly grounded in rationality. *See Chicago Life Insurance Co. v. Cherry,* 244 U.S. 25, 30 (1916).

CONCLUSION

Petitioners have not shown a single reason for grant of certiorari here. This case does not present a question of first impression; this case does not involve a lower court decision that conflicts with decisions of this Court; and this case does not involve a decision conflicting with the decisions of other lower courts. No substantial federal question whatsoever has been presented for review. And even the issues which Petitioners seek to dress in constitutional clothing were not properly preserved for this Court's review. Those issues were never raised in the court of first instance, the trial court. The only issue assigned as

error on appeal has now been waived. All other constitutional issues appearing in the Petition for Certiorari were raised for the first time on appeal, either on rehearing after the Oklahoma Court of Appeals had decided this case, or in the Petition for Certiorari to this Court.

This Court should not further burden its docket with Petitioners' meritless plea.

Respectfully submitted,

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